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Brief Cover in front

In the Supreme Court.

No. 9458.

SUCCESSION OF CHARLOTTE PIFFET.

ON OPPOSITION OF DR. C. H. TEBAULT, APPELLANT.

ON APPEAL BY DR. C. H. TEBAULT.

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SUCCESSION OF CHARLOTTE PIFFET.

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ON APPEAL BY DR. C. H. TEBAULT.

I. Mrs. Charlotte Piffet died at her residence in this city on the 17th of January, 1884.

The executors of her last will filed a provisional account of administration on the 12th of May following, upon which they placed the opponent, Dr. C. H. Tebault, as a creditor for three several amounts, to-wit:

"Dr. C. H. Tebault, bill of J. B. Piffet, $98.

Dr. C. H. Tebault, service Jan. 16, 1883, to Dec. 24, 1884, $135.

Dr. C. H. Tebault, service during last illness, 17 days, $300." Account, p. 5.

The appellant by his opposition claims:

1. For professional services rendered to Mr. Piffet during the year 1883.

2. For professional services rendered to Mrs. Knapp (a niece of deceased) and her children for several years.

3. For professional services to Mrs. Piffet during the year 1883.

4. For visit to and examination of her servant girl.

And lastly, for professional services to and attendance upon Mrs. Piffet during her last illness, from the 1st to 17th January, 1884, $2000, in all $2590.

As the executors have allowed the bill against Mr. Piffet and the bill against Mrs. Piffet for 1883, in which is included the charge for visit to and examination of servant girl, these may be dismissed from further consideration.

There remains in dispute but the bill for services to Mrs. Knapp and children, and for professional services to Mrs. Piffet, herself, during 17 days in January, 1884, to be considered.

Relative to the last, the allegation of the opposition is: "On January 1st, 1884, Mrs. Charlotte Piffet sent for petitioner in great and pressing haste to come to her with all possible dispatch, as she was flooding terribly. Petitioner responded at once and found her cold, speechless and almost pulseless, and petitioner stood by her bedside, and strove to preserve her life, for thirty odd consecutive hours without rest or nourishment, so dangerous was her condition; she revived, and by the continuous attention and medical skill of petitioner her life was prolonged until 17th January, 1884, at 7 P. M., enabling her to make her will and codicil and attend to her affairs. During this whole period petitioner, at her request, gave up his practice and his whole time, day and night, to Mrs Piffet, not sleeping more than two or three hours in the twenty-four; the last twenty-four hours being by her side continuously. She insisted on having petitioner continuously by her side, and if petitioner left to get a little rest or take something to eat, she would send for me, so as to prevent my visiting other patients. *Petitioner told her he was willing to do all that was possible for her, yet he had other patients requiring his attention. She at once contracted for his whole time, until she should get decidedly better, or until death should occur; and she offered petitioner to pay him two thousand dollars for this close*

and undivided personal attention, which proposition petitioner accepted and gave her his whole time and devoted attention. She had a loathsome and disgusting and offensive disease—cancer of the womb—with frequent and copious hemorrhages, and she required of petitioner to himself perform personal attentions and operations of a disagreeable character, not ordinarily required of a physician. *That his said services during these 17 days were well worth the sum of two thousand dollars.*" Pages 9 and 10.

II. The executors excepted that the opposition was inconsistent and contradictory in this: that it "sets out a special contract for the services rendered to deceased during her last illness, and at the same time claims as upon a *quantum meruit*," and called upon opponent to elect whether he would proceed upon the special contract or for a *quantum meruit.* Pages 11, 12.

The court sustained the exception and ordered opponent to elect. Thereupon he elected to proceed upon the contract. Page 13.

The executors objected to all evidence which counsel for opponent pretended to offer, to show the *value* of the services, in corroboration of the contract. This, however, the court permitted, and the executors reserved a bill of exceptions. Page 14. It is respectfully submitted that the court was in error in receiving any evidence, except such as went to prove the existence of the contract and the rendition of the services under it.

In Allen vs. Martin, 7 N. S. 300, Mr. Justice Martin, in delivering the opinion of the Court, said: "Our attention is drawn by the appellant to a bill of exceptions taken by his counsel below to the opinion of the court, refusing him leave to examine a witness as to the value of the plaintiff's services. Leave was refused on the ground of the plaintiff's having declared on a special agreement, which precluded the necessity, and rendered it useless to enquire into the value of the services. We think the District Court did not err."

Again, in Morton vs. Pollard, 9 La. 176, the same Judge, as the organ of the Court, said: "The parties having agreed on the price to be paid for the work and labor in putting up the mill, evidence of the value is inadmissible."

In Mitchell vs. Currell, 11 L. 253, the Supreme Court said: "The case of Morton vs. Pollard, cited by the defendant's counsel, appears to us inapplicable. It is true, that where the plaintiff declares on a contract, he cannot recover on a *quantum meruit*, but in this case no offer was made to prove the value of the work different from the price fixed by the contract."

In Walker vs. Bietry, 24 An. 349, it was held, that "an attorney-at-law who makes a contract with his client for a stipulated amount as the fees for attending to a litigation, cannot afterward recover on a *quantum meruit* for services rendered in the same litigation." See also Mazureau vs. Morgan, 25 An. 281.

In Provost vs. Carlin, 28 An. 595, the Supreme Court said: "The evidence fails to show a contract. Plaintiff and defendant never came to an agreement as to the amount the former was to receive for his services. As plaintiff elected to sue on a contract, he cannot recover on a *quantum meruit*."

And your Honors, in Bright vs. Metairie Cemetery Association, 33 An. 59, have said: "Hence it follows, that if a plaintiff sues for services under a special contract, he cannot be tolerated in an attempt to prove up his contract by showing the value of his services. Such value may be shown in support or corroboration of proof of the contract; but not to prove the contract, itself a part of other evidence, to substantiate the agreement as alleged."

Such evidence, if at all allowable, must go to prove the fact of the existence of the contract. Evidence of the value of services can never establish a contract to pay at a fixed rate.

Opponent being held to proof of the existence of the contract has failed to prove it. The only evidence tending to prove a contract is that of the unsupported testimony of the plaintiff

himself. This under the law is not sufficient, the demand exceeding $500. Succession of Segond, 7 Rob. 112; Hennen's Dig. p. 518, No. 7; Gordon vs. Stubbs, 36 An. 637. Cutter vs Collins 37 A 95.

III. But if it be true that the opponent made to the deceased the suggestion, that "he was willing to do all that was possible for her, yet he had other patients requiring his attention," which led to the alleged offer on her part to pay $2000 "for his whole time, until she should get decidedly better, or until death should occur," it was not, under the circumstances, a proper suggestion. The influence of the physician over the mind of the patient is very great. He stands in a relation of trust and confidence, and is by the law regarded with jealousy. So much so, indeed, that "doctors of physic or surgeons, who have professionally attended a person during the sickness of which he dies, cannot recover any benefit from donations *inter vivos* or *mortis causa*, made in their favor by the sick person during that sickness." Civil Code 1489 (1476).

Domat says: "Si quelqu'un, sans la probité et l'honneur de la profession de la médecine, exercant des fonctions ou des operations de la chirurgie, exigeait du malade ou de ses parens quelque composition d'une recompense que le peril les obligerait de lui promettre, il pourrait être justement condamné, non-seulement à la restitution de cette action, mais encore aux autres peines que la qualité du fait et les circonstances pourraient meriter, et à plus forte raison, s'il avait lui-même auparavant empiré le mal, a fin qu'on lui promis cette recompense." Droit Public, Lib. I, Tit. xvii, Sec. 1, §12.

In this he is supported by certain texts of the Roman law. Dig. L. 50, Tit. xiii, §3; Code, L. 10, Tit. 52, §9.

IV. But should the Court deem it proper to investigate the facts of the case, as developed in the record, and as if brought upon a *quantum meruit*, it will, we think, find:

1. That the opponent was the family physician of Mrs. Piffet

from 1879 to the time of her death, during all of which time she was suffering more or less from the disease of which she died.

2. That although treating her, he caused no examination to be made, so as to ascertain with certainty the nature and character of the disease, until Dr. Holliday was called in, a few days before her death.

3. That his visits were unusually long, and were uniformly charged for at $2 a visit—the bills being sent in and paid yearly. 171, 177. Testimony of L L. Levy, Esq., 148; Jos. Mighell, 115.

4. During the last illness he visited her but three times a day, and remained with her only two nights—the nights of the 2d and of the 16th January, 1884. Testimony of Miss Mighell, p. 136, of Joseph Mighell.

5. The pretense that he could not visit his other patients on her account is, we submit, disproved; and his alleged sacrifices on her account without foundation. Ib.

6. The testimony of the physicians who were examined in his behalf is given upon a hypothetical case, stated by his counsel, and not upon the facts; pp. 49, 57, 74, 89; the physicians having been examined before defendant's witnesses were heard.

7. The executors in their account have allowed Dr. Tebault for his services during the seventeen days of last illness, $300, which they submit is ample to cover the whole period of time, including the two nights during which he remained over night with the patient.

It is nearly $18 a day, or $6 a visit, or three times the amount of his previous charges.

V. The succession is not liable for the professional services rendered to Mrs. Knapp and children. See testimony of Dr. Knapp, pages 154–157; and Mrs. Knapp, pages 201–211.

The judgment appealed from states the law and facts so clearly, that further statement or argument may be deemed superfluous.

"The opponent has failed to establish a contract by such proof as is required by the law in all cases where a sum in excess of five hundred ($500) dollars is demanded. He is himself the only witness to the alleged contract for two thousand ($2000) dollars, to give the whole of his time to the deceased during her last illness, paying no attention to other patients.

"Three physicians were examined in behalf of the opponent, and each testified that he had never made a similar contract in the course of his professional experience; that such a contract was most unusual. The testimony of these physicians, so far from being corroborative, weakens the force of the testimony of the only witness to the contract.

"A number of persons in the house of Mrs. Piffet, during her last illness, Mr. Mighell, Major Levy, Miss Mighell, all stated that the opponent never spoke to them of having any such contract.

"And Major Levy states that when he demanded on one or two occasions from the opponent, that the opponent should send in his bill for services rendered against the estate, the opponent did not mention such a contract.

"The testimony of these witnesses, just cited, is not corroborative of the contract and weakens the force of the testimony of the only witness to the contract. There is no doubt that the opponent rendered valuable and onerous services, and did the law permit testimony of one witness to establish a contract, it is possible he might recover in this case in this form of action; but he has failed of that legal proof necessary to show a contract for a sum exceeding five hundred dollars. This case was tried at great length; I heard all the testimony, listened to it very carefully, and the conviction is a strong one in my mind that the opponent has utterly failed under the law to establish a contract by legal proof. The amount claimed by the opponent for medical services rendered to

Mr. Piffet, the husband of the deceased, is admitted by the executors and is on their account. There is no difference between the opponent and the executors on that score. The amount of five dollars for services rendered to a colored girl is included in the last bill rendered by the opponent to Mrs. Piffet before her death, and is included also on the account of the executors. The only questions to be determined by the court are whether the opponent has shown a contract for two thousand dollars for services during the last illness, and whether the opponent is entitled to recover from the succession of Mrs. Piffet for services rendered Mrs. Knapp during the years 1881, 1882 and 1883.

"The services during the last illness were undoubtedly rendered. They were rendered either on a contract or what is termed in law *quantum meruit*. Any of the surrounding circumstances is equally applicable to the view that the opponent expected to be paid for his services according to their value to be determined subsequently, as to the view that he was acting under a contract and must be entirely disregarded in determining whether or not a contract was actually made, for circumstances as consistent with one view as with the other view, give no aid whatsoever in determining the question. The danger of the service rendered, its onerous character, the length of time the opponent spent at the house of the deceased, are all circumstances as consistent with one view as with the other. I do not think that a contract has been established by legal proof. As to the bill for services rendered Mrs. Knapp, it appears that the bill for 1881 was repudiated by Mrs. Piffet; that application was made to Dr. Knapp for payment of that bill, and that on his failure to pay it, no further effort was made by Dr. Tebault, the opponent, to collect the bill from Mrs. Piffet. Mrs. Piffet paid her own bill for 1881, for the year 1882, and received a bill from the opponent for the year 1883. She did not pay the bill of 1883, but she made

no objection to it. It appears that it was not paid on account of her illness. Her executors have included it on their account. There is no evidence to show that Dr. Tebault presented the bill to Mrs. Piffet for Mrs. Knapp for the year 1882, or for the year 1883.

" When it is considered that those services were rendered not to Mrs. Piffet herself, nor to a member of her family as it then existed, the evidence should be very clear, direct and positive, to make her liable or her estate liable for the payment of the bills. The bills are not prescribed, but in view of the prompt payment by Mrs. Piffet, as shown by the record, of all of her obligations and particularly of the accounts of her medical adviser, these demands, on account of services rendered Mrs. Knapp, would come under the category of stale demands.

" For these reasons, it is ordered, adjudged and decreed, that there be a judgment in favor of the executors and against the opponent, with costs. And it is further ordered, adjudged and decreed, that the opponent be reserved the right hereafter to bring an action against the executors or the parties in interest for the value of his services rendered during the last illness of the deceased on a *quantum meruit*."

We have asked that the judgment appealed from be amended by rejecting the reservation made in the judgment allowing Dr. Tebault to sue upon a *quantum meruit*. Having alleged a special contract, and failing to establish it, he ought not to be permitted to stultify himself by claiming upon a *quantum meruit*. Mazureau & Hennen vs. Morgan, 25 An. 281.

T. GILMORE & SONS,

Attorneys for Executors.

SYLLABUS.

1. Plaintiff, a physician, alleging a specific agreement for the

payment of a certain sum for medical services to be rendered to the deceased, was required to elect between an action upon the contract, and for a *quantum meruit.*

2. Having elected to proceed upon the contract, evidence was not admissible to prove the value of the services, since proof of the value of services can never establish a contract to pay at a fixed rate.
3. Evidence was inadmissible of the value of the services in corroboration of the contract. Allen vs. Martin, 7 N. S. 300; Martin vs. Pollard, 9 L. 176; Twitchell vs. Currell, 11 L. 253; Walker vs. Bietry, 24 An. 349; Mazureau vs. Morgan, 25 An. 281; Provost vs. Carlin, 28 An. 595; Bright vs. Metairie Cemetery, 33 An. 59.
4. "The weakest evidence ever received in a court of justice is the relations of a witness of a conversation had with an individual dead at the time of the deposition." Succession of Segond, 7 Rob. 112; Hennen's Dig., p. 518, No. 7; Gordon vs. Stubbs, 36 An. 637.